Message

From: Covington, Tayler [covington.tayler@epa.gov]
Sent: 8/5/2020 2:13:07 PM
Subject: News Clips 8/5/2020
Attachments: News Clips 8-5-20.docx

REGION 2 NEWS

Reveal News: New York bill to ban toxic solvent TCE awaits governor's signature

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Recorder News: Lead Level In Water Still An Issue In Amsterdam

AMSTERDAM — The city issued a news release Tuesday informing the public that it still hasn't finished the state-approved plan to reduce elevated lead levels found in city water in 2018.
Randy Gardinier, the water treatment plant chief operator, said the Environmental Protection Agency has required the city to provide press releases every six months updating the ongoing efforts to reduce lead levels in the water.

NBC NEWS (AP): Puerto Rico power utility CEO resigns; thousands without power from last week's storm

SAN JUAN, Puerto Rico —The CEO of Puerto Rico's state-owned power company is resigning as thousands of clients remain without electricity since last week's tropical storm that further weakened a grid still trying to recover from previous hurricanes and earthquakes, officials said Monday.

InsideEPA: New Jersey delays consideration of environmental justice bill

New Jersey lawmakers have delayed consideration of legislation that would have forced state regulators to tighten consideration of environmental justice issues when permitting chemical and other facilities amidst opposition from labor and business groups, a possible sign that similar federal efforts could also face such resistance.

InsideEPA: Water Utilities Ask Congress To Strengthen SNURs After EPA Rejects Calls

Municipal utility operators are urging Congress to reform TSCA to require EPA to consider new chemicals' impacts on drinking water when writing significant new use rules (SNURs) after officials repeatedly rejected their calls to coordinate the rules with drinking water standards to limit chemical releases into the nation's water supplies.

InsideEPA: DOD Will Consult DOJ, EPA Over Compliance With States' PFAS Limits

The Defense Department (DOD) is weighing how to respond to states' new drinking water standards on per- and polyfluoroalkyl substances (PFAS) and to demands for alternative or treated drinking water supplies, and

will consult the Justice Department (DOJ) and EPA about DOD's legal authorities, a top DOD environment official says.

Queens Chronicle: State seeks help to monitor a bad bug

The state Department of Environmental Conservation is once again enlisting swimming pool owners in Queens and elsewhere to help in the fight to eradicate the Asian longhorned beetle from the state.

National News

Administration
The Hill: EPA transition back to the office alarms employees
Inside EPA: EPA unions oppose move to 'Phase 2' reopening during pandemic

Air
Inside EPA: ACE Opponents Ask Court To Reject EPA's 'Required' Air Law Reading
Inside EPA: In OMB Call, CARB Stresses Opposition To EPA Ending 'Once-In' Air Policy
Inside EPA: D.C. Circuit schedules October argument in suit over EPA ACE rule

Water
JD Supra: Safe Drinking Water Act Enforcement: U.S. Environmental Protection Agency and Township of Belleville, New Jersey, Enter into Consent Agreement
Inside EPA: Ranchers urge district court to block several WOTUS rule provisions

Pesticides
Bloomberg Law: Democratic Bill Would Strengthen EPA's Pesticide Protections

COVID
Inside EPA: Western Air Regulators Fear Dual Threats Of Wildfires, COVID-19 Pandemic

Chemicals
National Law Review: EPA Awards $4 Million to Develop New Approaches for Evaluating Chemical Toxicokinetics

Policy
JD Supra: EPA Clarifies Superfund Liability Protections for State and Local Governments
Law 360: EPA Defends Rule Permitting More Year-Round Ethanol Use
Inside EPA: EPA Defends Rule Authorizing Year-Round Use Of E15 In Most Vehicles
Reuters: U.S. Energy Department recommends granting partial retroactive waivers to refiners: sources

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Region 2 News

Reveal News: New York bill to ban toxic solvent TCE awaits governor's signature

https://www.revealnews.org/article/new-york-bill-to-ban-toxic-solvent-tce-awaits-governors-signature/

By Elizabeth Shogren

August 4, 2020

Todd Kaminsky, chairman of the New York State Senate's Environmental Conservation Committee, was driving to a political event in February when a radio segment caught his attention. It was a Reveal story about a toxic chemical solvent – trichloroethylene, or TCE – that can cause a range of cancers and immune disorders and deform fetal hearts.

Kaminsky, a Democrat from Long Island, had long been aware of the dangerous chemical, widely used to remove grease at dry cleaners, military bases and manufacturing facilities. After the Trump administration had scuttled TCE restrictions proposed under President Barack Obama, he'd introduced a bill in November to put similar restrictions in place in New York. But it was just one of more than 100 bills he'd introduced in the current legislative year, according to his staff.

Kaminsky found Reveal's story "so powerful" that he decided to make a TCE ban the top priority of the session, he told Reveal from The Center for Investigative Reporting. "This is very rare where the two things meet," he recalled thinking, "where you see a need and you have the power to do something about it."

Late last month, both chambers of the State Legislature passed the bill. A spokesperson for Gov. Andrew Cuomo said he will review it.

Not long after the bill was introduced, chemical companies began urging New York legislators not to ban TCE, but to wait for federal action based on a risk evaluation underway at the Environmental Protection Agency. Reveal reported in February that the White House had directed the EPA to rewrite its evaluation of TCE, downplaying the risks. A draft evaluation by EPA scientists, years in the making, had set unsafe exposure levels based on the risk to fetal hearts from even trace amounts of TCE. After White House edits, the draft swapped in a different benchmark, based on the higher exposure levels at which TCE can trigger immunosuppression.

The potential impact on any future regulations could be enormous. TCE is still used widely to take grease off everything from silk blouses to missiles. Dry cleaners use it. So do automobile brake shops, small metal parts manufacturers and refineries. It's used in refrigerants and glues for hair extensions.

Scientists, including some on the EPA's Science Advisory Committee on Chemicals, have called on the EPA to probe Reveal's report that the White House interfered in its scientific assessment. "The allegation should be investigated, as a mere suggestion that EPA changed the earlier scientific evaluation, based on pressures from non-scientific sources, cast significant doubt to the scientific integrity that EPA has worked so hard to maintain," some scientists told the EPA during a meeting to peer-review the draft assessment's findings.

During a U.S. Senate hearing in June, Sen. Maria Cantwell, D-Wash., questioned White House official Nancy Beck, a former chemical industry lobbyist, about political interference in the TCE risk evaluation. Cantwell noted that "the White House overruled EPA's own scientists" and pressed Beck about her role: "So, Dr. Beck, yes or no, were you involved or responsible?"

Beck refused to answer, saying behind-the-scenes input from the White House was protected from public view as part of the "deliberative" process. That hearing was about Beck's nomination to lead the Consumer Product Safety Commission. Since then, some Republican senators have joined the opposition to Beck, and her confirmation has been stalled.

The EPA said it expects to release its final TCE risk evaluation by the end of the year, the final step before rulemaking. The agency has not responded to the scientists' request to investigate political influence over the draft. But the EPA has defended the decision to switch away from fetal cardiac defects as a baseline.

"While EPA's draft risk evaluation found evidence that TCE may produce cardiac effects in humans, these effects were not observed consistently across all the available science," an EPA spokesperson said in an email to Reveal, though the agency's own scientists had assessed all the research and concluded that TCE can cause fetal heart damage.

The Halogenated Solvents Industry Alliance, which represents companies that sell TCE, fought the New York bill. The trade group stressed that it was the job of the federal government, and not states, to review chemicals.

"HSIA respectfully requests that the State of New York await release of the EPA's final risk evaluation of TCE to determine what risk management steps, if any, are appropriate," the group said in an April memorandum of opposition signed by Executive Director Faye Graul and counsel Thomas W. Faist. "The State should not second-guess the work of the federal government before completion of its task."

A piece of federal legislation, the Lautenberg Chemical Safety Act of 2016, could complicate a New York TCE ban. Under that law, federal regulatory decisions supersede state ones.

Environmental groups support the New York ban because of the federal government's long-standing failure to restrict the chemical. Reveal's investigation uncovered a decades-long effort by chemical companies and their supporters in the federal government to attack and undermine the science showing the connection between TCE and fetal heart defects, in an effort to beat back regulation of the ubiquitous chemical.

Kaminsky first learned about TCE from "A Civil Action," a 1998 feature film about TCE-contaminated water in Woburn, Massachusetts, starring John Travolta and Robert Duvall. That community suffered significant increases in childhood leukemia and other cancers. Plaintiffs accused Beatrice Foods and W.R. Grace & Co. of dumping TCE and other chemicals that eventually reached Woburn's drinking water. In February, an investigation by Long Island newspaper Newsday exposed that military contractor Northrop Grumman Corp. knew since the 1970s that its operations were polluting groundwater in Long Island with TCE and other toxic chemicals. As a result of the contamination, public drinking water in Bethpage and other Long Island communities has to be treated.

Reveal's investigation found that TCE contamination is present in nearly 800 toxic Superfund sites in every state. The military has found it in 1,400 of its operational facilities.

Minnesota adopted a TCE ban in May.

Kaminsky said the New York State Legislature acted because he and his colleagues do not believe the federal government will take action to ban TCE – at least not under President Donald Trump. "We are just one state, but we're hoping this could be a model for others, and we're hoping the federal government will get its act together," Kaminsky said.

COVID-19 postponed action on New York's bill because legislators were not meeting, but it may also have helped avoid a lobbying blitz against the bill. With the Capitol closed to the public, Kaminsky was unable to bring scientists to Albany to testify about TCE's risks, but that meant chemical industry lobbyists did not have access to legislators either.

But foes of the TCE ban may aim their sights on Cuomo. "It now goes before the governor, and I'm sure a lot of those forces will be trying to get him to not sign the bill," Kaminsky said. "And I'm hopeful he will."

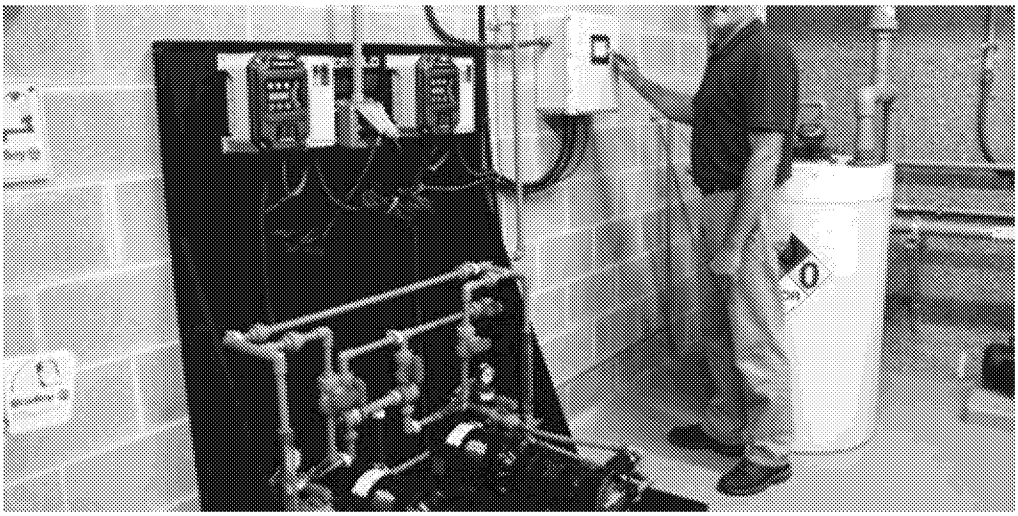
RECORDER NEWS

https://www.recordernews.com/news/local-news/178666

Lead Level In Water Still An Issue In Amsterdam

by Jason Subik

August 4, 2020



AMSTERDAM — The city issued a news release Tuesday informing the public that it still hasn't finished the state-approved plan to reduce elevated lead levels found in city water in 2018.
Randy Gardinier, the water treatment plant chief operator, said the Environmental Protection Agency has required the city to provide press releases every six months updating the ongoing efforts to reduce lead levels in the water.

"These releases are canned language required by the [New York state] Department of Health, and in some cases it kind of makes people think the sky is falling," Gardinier said.

He said the federal government and the state Department of Health also require the city to provide water users with quarterly notices and an annual water quality report, all detailing the ongoing effort to reduce the lead levels.

Amsterdam's water triggered EPA violations in April and September of 2018 when lead levels were found to exceed 15 parts per billion, the September 2018 testing showing 21 parts per billion.

In May 2017, the EPA determined Amsterdam failed to comply with the federal "Lead and Copper Rule" after auditing the city's lead testing records from 2012 through 2017. The finding spurred the federal agency to issue an administrative order against the city.

A critical issue was the city's failure to collect water samples from distribution system customers at "Tier 1"

sites, which are homes receiving water from a lead service line, containing lead pipes, or having copper pipes with lead solder installed between 1983 and 1988.

In 2019, the DOH awarded the cities of Amsterdam and Johnstown each $521,785 grants to replace lead service lines supplying residential drinking water.

Gardinier said, as far as he knows, none of the lead service lines have yet been replaced with the grant money. He said he doesn't expect that replacement work to happen until 2021, particularly on Church Street, which is scheduled for a major reconstruction project in the spring of 2021. He said the lead line replacements won't affect any future EPA testing of the city's water because 60 "Tier 1" sites that still have lead service lines will need to be used for the future testing.

Gardinier said he doesn't know if the lead levels are still elevated, because there hasn't been the same kind of testing for lead as the EPA did since 2018. He said there likely won't be another test of the water until the city completes its state-approved Corrosion Control Optimization Program, which he anticipates won't be until 2021, at the earliest.

"There is the potential that we are not in violation at this time, but — because sampling hasn't been done because of the optimization we are working on — we don't know for sure," he said.
Amsterdam has hired M.J. Engineering, of Clifton Park, to help design its plan to reduce the acidity and thus corrosiveness of the city's water supply as a means of limiting the amount of material being stripped from lead pipes in the city's water infrastructure.

Gardinier said about 25 percent of the Corrosion Control Optimization Program has been implemented, but the process has been slowed by the coronavirus pandemic.

"Our corrosion control inhibiting chemical has been flow-paced, whereas before [the system] was feeding [the chemical into the water] a set amount, so now it's fed as the water flow increases or decreases with the [amount of water] flow itself," he said. "As far as the rest of it, a lot of the work has been developing the plan, water testing that we had to do to come up with for this plan."

Part of the corrosion control plan is to use soda ash to make the city's water more alkaline and less acidic.

Gardinier said the next steps are going to be constructing a silo for the soda ash and replacing the city's 45-year-old "chlorinator" equipment, machines used to inject chlorine into the water to disinfect it.

M.J. Engineering is expected to finish the entire plan design by the end of the year. Gardinier said he expects the entire project will cost "hundreds of thousands of dollars."

Gardinier said after the Corrosion Control Optimization Program is completed and implemented EPA will test 60 Tier 1 sites again, and the results will determine how the city has to proceed.

In the meantime, Gardinier said anyone who is concerned about the lead level should run their faucets for 30 seconds before using the water, because that will allow any lead that's settled in lead service lines to flush out.

"The water is absolutely safe to drink," he said.

City residents concerned they may have elevated levels of lead in their drinking water can access a free water testing service from New York state by calling 518-402-7650 or going to the state Department of Health's website at health.ny.gov/environmental/water/drinking/lead/free_lead_testing_pilot_program.htm.

The city of Amsterdam also tests 60 locations every six months for lead and residents interested in being tested can call 518-843-3009 to be put on a waiting list.

NBC NEWS (AP)

https://www.nbcnews.com/news/latino/puerto-rico-power-utility-ceo-resigns-thousands-without-power-last-n1235661

Puerto Rico power utility CEO resigns; thousands without power from last week's storm

By Associated Press

August 3, 2020

SAN JUAN, Puerto Rico —The CEO of Puerto Rico's state-owned power company is resigning as thousands of clients remain without electricity since last week's tropical storm that further weakened a grid still trying to recover from previous hurricanes and earthquakes, officials said Monday.

José Ortiz is expected to step down on Wednesday amid widespread anger and impatience with ongoing power outages that are occurring during a pandemic, at the height of what is expected to be an unusually active hurricane season as hundreds of thousands of parents prepare for the start of a virtual school year.

"It's irresponsible and a lack of respect that a simple storm unleashed the chaos we have now," said Natalia Núñez, who lives in San Juan and has been without power since Thursday.

Many Puerto Ricans also are dissatisfied with how the Electric Power Authority handled recent outages including one last week that was not storm-related and left more than 300,000 customers without power. Then Isaias swiped the island as a tropical storm, leaving more than 400,000 more clients in the dark. By Monday afternoon, more than 20,000 customers were still without power.

"That is not normal," Walberto Rolón, a secretary for UTIER, a power workers' union, told The Associated Press. "We don't have employees or suitable equipment...this is something that can be fixed."

Rolón and others celebrated Ortiz's upcoming resignation, accusing him and other company officials of improvising as outages continue.

Gov. Wanda Vázquez said the announcement comes after she met with the president of the power company's board to demand it take all necessary action as she questioned the outages and the way officials handled the storm.

Ortiz had become the company's third CEO in two weeks when he was appointed to the position in July 2018 as the island struggled to recover from a lack of leadership, bankruptcy and outages caused by Hurricane Maria. He said on Monday that at the time he committed to the position for two years.

"My resignation comes at an appropriate moment in the transformation of PREPA into the modern electric utility all Puerto Ricans deserve," Ortiz said in a statement.

Last week, Ortiz blamed the outage prior to the storm on what he said was sabotage or human error, saying it was done manually. However, the company's head of transmission and distribution disputed that conclusion, saying it was too early to say what happened.

Meanwhile, the company's 1.5 million customers grow increasingly exasperated with the ongoing outages. Among them is Laura Mejía, a mother of two who lives in an impoverished neighborhood and was forced to throw out food when she was left without power for three days a week before Isaias skirted the island.

"We spent three days without sleep," she said, noting that recent heat indexes have surpassed 100 degrees Fahrenheit. "We were incommunicados and didn't even have a fan because we don't have a generator."

InsideEPA

https://insideepa.com/tsca-takes/new-jersey-delays-consideration-environmental-justice-bill

New Jersey delays consideration of environmental justice bill

August 3, 2020

New Jersey lawmakers have delayed consideration of legislation that would have forced state regulators to tighten consideration of environmental justice issues when permitting chemical and other facilities amidst opposition from labor and business groups, a possible sign that similar federal efforts could also face such resistance.

According to environmentalists and local press reports, while the bill, A2212-S232, had cleared the Senate, Assembly Speaker Craig Coughlin (D) did not post it for a vote despite supporters' claims that they had secured enough votes to approve it.

"New Jersey Assembly Democrats failed to deliver justice to New Jersey environmental justice communities. We are extremely disappointed the Speaker did not even give this bill a chance. It would merely give some measure of correction to communities already overburdened by air and water pollution," the New Jersey Environmental Justice Alliance, Ironbound Community Corp. and Clean Water Action said in a joint July 30 statement.

According to the statement, the Assembly majority still has until the end of August to consider the legislation.

The bill generally requires state regulators to block permits for new facilities or renewals of existing facility permits if an environmental justice impact analysis shows the action would, "together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities within the State, county, or other geographic unit of analysis."

The legislation also provides a limited exception, allowing regulators to issue permits that impose "conditions on the construction and operation of the facility to protect public health" in cases where regulators determine "that a new or expanded facility will serve a compelling public interest in the community where it is to be located."

The measure could affect facilities that may be planned for about 310 municipalities in the state, according to state officials.

The bill has won strong support from Gov. Phil Murphy (D), who has said it will help the state take a "momentous step forward" in preventing "further environmental burdens on residents in our urban, rural, and low-income areas, which are predominantly communities of color."

But according to local press, business and labor groups oppose the legislation, fearing it will create too much uncertainty for businesses and their workers.

"The bill was well-intentioned, but too broad with too much uncertainty," Ray Cantor, vice president of the New Jersey Business & Industry Association, told NJ Spotlight.

The dispute in New Jersey comes as federal Democratic policymakers, including the party's presidential nominee, former Vice President Joe Biden, environmentalists and others have been pledging to strengthen consideration of environmental justice issues at the federal level.

Biden, for example, has embraced calls for a major governmental reorganization to elevate environmental justice considerations in federal toxics and other policymaking. In addition, top Senate Democrats, including several whom Biden is considering tapping as his running mate, introduced legislation codifying key proposals.

InsideEPA
https://insideepa.com/tsca-news/water-utilities-ask-congress-strengthen-snurs-after-epa-rejects-calls
Water Utilities Ask Congress To Strengthen SNURs After EPA Rejects Calls

August 3, 2020

Municipal utility operators are urging Congress to reform TSCA to require EPA to consider new chemicals' impacts on drinking water when writing significant new use rules (SNURs) after officials repeatedly rejected their calls to coordinate the rules with drinking water standards to limit chemical releases into the nation's water supplies.

"These SNURs regularly include chemicals which are highly persistent, migrate easily to groundwater, or are difficult to remove through normal wastewater treatment practices," Diane VanDe Hei, CEO of the Association of Metropolitan Water Agencies (AMWA), told the House Energy & Commerce environment and climate change subcommittee in July 28 testimony.

"AMWA believes Congress should explore whether legislative changes to TSCA are necessary to ensure impacts on drinking water sources are being fully considered as EPA examines and greenlights these new and existing chemicals for use. It is more effective and more equitable to control pollutants at the source, where they are highly concentrated, than it is to remove them at the consumer's expense after they have entered a water body or supply source," she argued.

"Congress should similarly explore ways to strengthen source water and groundwater protection initiatives that are designed to keep contaminants out of drinking water sources," she added.
VanDe Hei said the narrow scope of reviews for developing SNURs has been highlighted by concerns about EPA approvals of per- and polyfluoroalkyl substances (PFAS) which are now linked to drinking water contamination, a hot-button issue on Capitol Hill.

"Although AMWA does not doubt that EPA is performing thorough assessments of these new chemicals, we only need to look as far as the various PFAS chemicals which were previously thought to be inert to see where this strategy might fail," VanDe Hei told the subcommittee to call for congressional action.

VanDe Hei's call comes after the agency has repeatedly rejected requests from AMWA and other drinking water groups to coordinate Toxic Substances Control Act (TSCA) and Safe Drinking Water Act issues and consider the impacts of new chemicals on drinking water resources when approving them for use.

Last month, for example, EPA issued a SNUR for more than a dozen chemicals that prompted a similar call for reforms by AMWA, and a similar rejection from the agency.

Most recently, EPA published a final SNUR for several new chemicals in the Aug. 3 *Federal Register* where the agency dismissed as laudable but unworkable AMWA's proposals to reform the SNUR process by considering data on existing water contaminants when making decisions about restricting the use of new chemicals.

"EPA agrees on the benefits of coordination of the Office of Pollution Prevention and Toxics and the Office of Ground Water and Drinking Water to protect drinking water supplies," the agency says in its response to AMWA's 2019 comments on a proposed version of the SNUR, while emphasizing the distinct nature of the two programs.

"While the [TSCA] and [SDWA] are two distinct laws, they share a mandate to protect human health and the environment," EPA says in its response to comments entered into the rulemaking docket on Aug. 3.

"When determining whether to regulate manufactured chemicals, SDWA typically addresses comparatively data-rich existing substances now in commerce, while the TSCA new chemicals program reviews chemicals

prior to entering the marketplace. The two programs do coordinate, where applicable, but conduct risk assessments and take risk management actions consistent with the requirements of their respective laws."

Significant New Use Rule

The SNUR in question sets notification requirements for manufacturers of 2,4-hexadien-1-ol, 1-acetate which the agency found does not pose an unreasonable risk based on the uses laid out in the premanufacture notification (PMN).

"Based on EPA's TSCA New Chemicals Program Chemical Categories for Vinyl Esters, physical/chemical properties and test data on the new chemical substance and analogous chemical substances, EPA estimates that the chemical substance has high environmental hazard and potential for the following human health hazards: specific target organ toxicity, skin sensitization, and skin and eye irritation," according to EPA's determination for the PMN.

EPA says the PMN lays out "conditions of use that mitigate the human health and environmental risks. Therefore, EPA concludes that the new chemical is not likely to present unreasonable risk to human health or the environment under the intended conditions of use."

But AMWA disagrees, arguing that trace releases of the substance into waterways could prove harmful while citing the PMN as a case in point to reiterate its longstanding push for greater coordination by EPA's drinking water and toxics offices.

"Within the notice EPA identified concerns for 'specific target organ toxicity, skin and eye irritation, neurotoxicity, and aquatic toxicity' based on data from analogous chemicals," argues AMWA in its Oct. 10, 2019 comments on the proposed SNUR.

"The notice goes on to require that there be no releases to surface waters that would exceed 5 ppb. After reviewing the information included within the docket, AMWA is concerned with EPA's intent to permit the release of this chemical into surface waters," the water utility group says.

The water group also argues that additional data available from the agency's drinking water office should be used to better assess those potential impacts.

AMWA "strongly encourages" the Office of Pollution Prevention and Toxics "to utilize the knowledge base of the drinking water program" at EPA's Office of Groundwater and Drinking Water "to better inform decision making for future SNURs."

The water utility group also presses EPA to use its full TSCA authority to force additional study by manufacturers of new chemicals through the use of orders.

"The agency states that the orders do not require testing to help determine potential health and/or environmental effects. The only incentive for manufacturers or users of these chemicals to obtain and submit this information is so that a modification or revoking of the PMN would be allowed. This approach provides a disincentive for additional study that could reveal more harmful health effects since disclosure of new information to the agency could prompt further study by EPA," according to AMWA.

In response, EPA says the SNUR does not approve new chemical uses but rather sets the conditions for companies to inform the agency of intended new uses which will trigger additional risk reviews.

"The Significant New Use designation ensures that EPA has an opportunity to review and make a determination on that use prior to the commercial manufacture/processing for chemical. EPA evaluated the PMN substance and determined that the conditions in the SNUR -- including limits on the release of the substances to water --

sufficiently protect against potential unreasonable risk to health and the environment," the agency argues in its response to AMWA and other commenters. -- *Rick Weber* (rweber@iwpnews.com)

InsideEPA
https://insideepa.com/daily-news/dod-will-consult-doj-epa-over-compliance-states-pfas-limits

DOD Will Consult DOJ, EPA Over Compliance With States' PFAS Limits

July 31, 2020

The Defense Department (DOD) is weighing how to respond to states' new drinking water standards on per- and polyfluoroalkyl substances (PFAS) and to demands for alternative or treated drinking water supplies, and will consult the Justice Department (DOJ) and EPA about DOD's legal authorities, a top DOD environment official says.

"We're working closely with our General Counsel, and we're going to have discussions with the Department of Justice and with EPA to figure out what [are] our authorities in this time," Maureen Sullivan, DOD deputy assistant secretary for environment, said when pressed by New Jersey's top environment official about DOD's response to newly issued state PFAS drinking water standards during a state-led PFAS conference.

Sullivan was speaking on the second day of a July 29-30 virtual "State Environmental Protection (STEP) Meeting: Partnering on PFAS" event hosted by the Environmental Council of the States, which represents many state regulators.

Her response signals potentially a new direction for DOD as the military services in some instances have fought states' attempt to force compliance with their PFAS standards.

For instance, New Mexico is suing DOD over PFAS to seek compliance with its cleanup authorities under its state hazardous waste law. DOD faces significant cleanup obligations for PFAS at more than 300 of its bases, due to its use of firefighting foam containing the chemicals.

Sullivan's response also comes as defense authorization legislation moves forward that could blunt debate over whether DOD has wriggle room to avoid compliance. The House July 21 passed a defense authorization bill that would require DOD to comply with state drinking water and groundwater PFAS requirements unless they are weaker than any federal level. The bill now must be conferenced with the Senate version of the fiscal year 2021 defense authorization act.

During a panel at the ECOS STEP meeting on federal perspectives, New Jersey Department of Environmental Protection Commissioner Catherine McCabe asked Sullivan with respect to the military's cleanup work, "will DOD be honoring the newly promulgated state [maximum contaminant level (MCL)] standards for PFAS in drinking water when requested to provide alternate drinking water or treatment?"

Sullivan initially referred to considering such standards in the lengthy process under the Superfund law. Specifically, she said under that process, state MCLs are examined when DOD considers applicable or relevant and appropriate requirements (ARARs) as part of the remedial investigation/feasibility study process, and those standards inform DOD in determining risk and cleanup. According to EPA's website, the Superfund law "requires that on-site remedial actions attain or waive federal environmental ARARs, or more stringent state environmental ARARs, upon completion of the remedial action."

But McCabe pressed Sullivan, noting the consideration of ARARs in the cleanup of some of these sites would be many years down the road, but that people already recognize their drinking water is contaminated and want bottled water or a connection to another municipal water supply. "How do we tell them they have to wait eight years?" she asked.

'Strong Partnership'

Sullivan said while she does not have a clear answer right now, her office is working with DOD's general counsel and plans to discuss it with DOJ and EPA. She said DOD is trying to determine its legal authorities. "And we'll do this in strong partnership with EPA and with the Department of Justice so that we have a good, clean, consistent answer to how to approach this issue."

McCabe then asked that DOD include ECOS in those discussions so states can have a voice in the matter as well.
States in recent months have approved enforceable MCLs to address PFAS contamination in their states, including New Jersey, which in April approved enforceable MCLs for the two most studied PFAS -- perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) -- at 14 parts per trillion (ppt) for the former and 13 ppt for the latter.
And New York and Michigan in recent days signed off on similarly stringent levels in their states. Often, the newly promulgated state standards are more stringent than EPA's non-enforceable drinking water advisory of 70 ppt for PFOA and PFOS, alone or combined, that DOD has been following in its cleanups.

DOD's weighing of its legal authorities after state action on drinking water limits comes as the House has included in its defense authorization bill a requirement that DOD meet state PFAS cleanup standards when those standards exceed federal ones. It would compel DOD to comply with the most stringent applicable standard -- whether state or federal -- to clean up PFAS contamination in groundwater or drinking water not currently used for drinking water. The measure applies just to PFOA and PFOS. -- *Suzanne Yohannan* (svohannan@ipwnews.com)

Queens Chronicle

https://www.qchron.com/editions/eastern/state-seeks-help-to-monitor-a-bad-bug/article_8e4159c3-4731-52ee-a9c6-d84f410f8179.html

State seeks help to monitor a bad bug

July 30, 2020

The state Department of Environmental Conservation is once again enlisting swimming pool owners in Queens and elsewhere to help in the fight to eradicate the Asian longhorned beetle from the state.

The invasive insects, first recorded in the United States in 1996, bore holes into hardwood trees such as maple, birch and willow. They are blamed for killing hundreds of thousands of trees in the country since their accidental introduction.

The state every August — the bugs are most active in late summer — asks swimming pool owners to periodically check their filters to see if they contain the remains of the 1.5-inch insects that are black with white spots and long antennae.

They are asked to either email a photo of a suspect insect to state forestry officials at foresthealth@dec.ny.gov, or to mail the insects themselves to the DEC's Forest Health Diagnostics Lab, 108 Game Farm Road, Delmar, NY 12054, Attn: Jessica Cancelliere.

They are believed to have been eliminated in Queens, Brooklyn, Manhattan and Staten Island, but are active on central Long Island and in the Northeast.

"Most invasive forest pest infestations have been discovered and reported by members of the public, making citizen science a vital tool for protecting our urban and rural forests," DEC Commissioner Basil Seggos said in a press release.

"Swimming pool monitoring is a simple, economical approach to surveying for Asian longhorned beetles and gives New Yorkers the chance to take an active role in protecting the trees in their yards and communities."

National News

EPA Clarifies Superfund Liability Protections for State and Local Governments
https://www.jdsupra.com/legalnews/epa-clarifies-superfund-liability-71179/

August 3, 2020
Holland & Knight LLP

EPA Clarifies Superfund Liability Protections for State and Local Governments
Latest Guidance Addresses the Purchase of Contaminated Properties

Amy L. Edwards | Meaghan A. Colligan
Highlights

- State and local governments often deliberately acquire contaminated properties to assist with redevelopment efforts that can financially, environmentally, and socially transform and revitalize their communities. The U.S. Environmental Protection Agency's (EPA) Guidance on June 15, 2020, confirms that state and local governments that perform due diligence prior to acquisition and take certain steps post-closing will be eligible to secure and maintain landowner liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
- In many instances, state and local governments acquire contaminated properties in emergency or unplanned situations and are unable to perform pre-acquisition due diligence to secure a landowner liability protection under CERCLA. Prior to 2018, states and localities could only qualify for an exemption from the definition of an "owner" responsible for remediation of historic contamination if they had involuntarily acquired the property.

- The 2018 Better Utilization of Investment Leading to Development Act (BUILD Act) amended CERCLA and provided more certainty to state and local governments by removing the term "involuntary," and provided a more specific, albeit limited, list of circumstances in which state and local governments are exempt from the definition of an "owner" responsible for remediation of historic contamination.
- The EPA's latest guidance provided additional clarifications to the 2018 BUILD Act amendment to the landowner exemption for state and local governments. Notably, EPA clarified what situations are covered by the new broad category of "circumstances in which the government takes title by virtue of its function as sovereign."

The U.S. Environmental Protection Agency (EPA) issued important guidance (EPA's Guidance) on June 15, 2020, clarifying the recently amended exemption of state and local governments from the definition of an "owner" responsible for remediating contaminated properties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in certain acquisition scenarios or circumstances.

State and local governments often deliberately acquire contaminated properties to assist with redevelopment efforts that can financially, environmentally, and socially transform and revitalize their communities. However, state and local governments are at risk of being held responsible to remediate the historic contamination at these properties as the current owner under CERCLA. EPA's Guidance confirms that state and local governments can mitigate this risk by performing due diligence prior to acquisition and taking certain steps after the closing to secure and maintain CERCLA's bona fide prospective purchaser (BFPP) and innocent landowner (ILO) protections available to other prospective purchasers.

In many instances, state and local governments acquire contaminated properties in emergency or unplanned situations and are, therefore, unable to perform pre-acquisition due diligence to secure landowner liability protections under CERCLA. Prior to 2018, state and localities could satisfy an exemption from the definition of an owner responsible to remediation historic contamination if they had involuntarily acquired the property. This term does not adequately capture all unplanned or emergency situations in which a state and local government would acquire a property.

The 2018 Better Utilization of Investment Leading to Development Act (BUILD Act) amendments to Section 101(20)(D) of CERCLA clarified that the owner/operator protections were no longer dependent on acquisitions being involuntary, and provided a more specific, albeit limited, list of circumstances in which state and local governments are exempt from the definition of an "owner" responsible for remediation of historic contamination. Even with these changes, the Section 101(20)(D) exemption from CERCLA liability for local governments is fairly limited, and would apply only under the following circumstances:

- through seizure or in connection with law enforcement activity
- bankruptcy
- tax delinquency
- abandonment or other circumstances in which the government takes title by virtue of its function as sovereign

However, these new categories of acquisitions and other terms in CERCLA have raised several new questions, which EPA's Guidance clarified. This Holland & Knight alert discusses the questions that EPA clarified it its latest guidance.

Which Entities Qualify as a "Unit of Local Government" under CERCLA?

Many state and local governments establish entities, such as land banks and redevelopment authorities, to assist with the acquisition, remediation, and redevelopment of contaminated and underutilized properties. Since "State and local governments" are not defined under CERCLA, one critical question is which units of local government, if any, qualify for the Section 101(20)(D) exemption from CERCLA landowner liability. EPA's Guidance indicated that it will turn to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, to determine whether a particular unit of state or local government qualifies or not. EPA confirmed that it intends to recognize redevelopment authorities, land banks and community development agencies as a "local government" under CERCLA § 101(20)(D).

Which Additional Governmental Acquisitions Fall Under the Local Government Exemption from CERCLA Owner Liability?

Furthermore, EPA did not provide a definition to clarify what it intended by a state or local government taking title "by virtue of its function as sovereign" in the BUILD Act amendments to Section 101(20)(D). EPA indicated that it is interpreting this language as any acquisition that is a uniquely governmental function, such as the following:

- tax lien foreclosures
- tax increment financing transactions
- escheat
- eminent domain, especially when that authority is used to create parks, recreation, civic buildings, mass transit, infrastructure, utility projects, and the like
- holding an unexercised right of way
- demolition lien foreclosures
- acting as a conservator or a receiver
- transfers between governmental entities related to tax delinquent properties, as enumerated in the receiving agency's enabling statute

Does an Acquisition by Means of a Purchase, Inheritance, Bequest, Gift or Donation Qualify as "Taking Title by Virtue of its Function as Sovereign"?

When an acquisition is by means of a purchase, inheritance, bequest, gift or donation, EPA's Guidance advises local governments to look to the elements of the BFPP or IPO protections to CERCLA liability to establish and maintain their liability protections. EPA points local governments to its 2019 Common Elements Guidance (Common Elements Guidance) to understand what steps must be taken prior to taking title, and what steps must be taken after acquiring title.

Briefly, to secure the BFPP protection, the locality must establish the following pre-acquisition criteria:

- performance of an "all appropriate inquiries," and
- not being affiliated with a responsible party or potentially liable party

To maintain the BFPP protection, the locality must satisfy the following post–acquisition criteria:

- do not dispose of contamination post-acquisition
- do not impede the integrity or effectiveness of institutional controls
- comply with land use restrictions

- exercise appropriate care by taking reasonable steps with respect to hazardous substances affecting the property
- provide full cooperation, access and assistance to remedial parties and governmental agencies with respect to ongoing remedial efforts
- comply with information requests and subpoenas, and
- provide legally required notices for any releases of contamination

EPA's Common Elements Guidance describes each of these requirements in detail. See Holland & Knight's previous alert for a more in-depth summary of EPA's Common Elements Guidance and the nuances of each of these requirements.

How Involved Should Local Governments Be in the Development and Future Operations at Their Properties?

EPA's Guidance makes special effort to discuss the role of local governments in implementing, monitoring and enforcing compliance with institutional controls, such as deed restrictions, environmental easements, and building and zoning codes. EPA expects local governments to work with developers, prospective buyers and tenants, and other parties that will be engaged in the development and operational future of the site to ensure that institutional controls are understood and integrated into the construction and development of their properties. In essence, EPA confirms that municipalities must actively participate in construction and development to ensure that the continuing obligations are executed to avoid losing their landowner liability protections against CERCLA liability.

Do Windfall Liens Apply to Local Governments that Satisfy the BFPP?

Whether a local government owner qualifies as a BFPP or not, EPA reminded local governments that EPA's expenditures of response costs at properties acquired by local governments could be subject to windfall liens if EPA incurs any response costs that increase the fair market value of their properties. EPA pointed localities to its 2002 guidance on windfall liens and to 2003 joint guidance from EPA and the U.S. Department of Justice.

When Does the Innocent Landowner Exemption to CERCLA Liability Apply to Local Governments?

EPA Guidance indicates that the ILO defense may be appropriate for local governments when the contamination was caused solely by the act or omission of a third party and the locality exercised due care. This is particularly appropriate in situations where the locality acquired title to the property via escheat, an involuntary transfer or acquisition, or eminent domain. EPA encouraged local governments to review its Common Elements Guide closely to understand the due care requirements with respect to contamination that the locality did not cause but which remains on the property.

Are There any Unique Enforcement Avoidance Tools for Local Governments?

Finally, EPA discussed several topics related to enforcement avoidance tools that local governments can utilize. EPA noted that there is an enforcement bar under Section 128(b) of CERCLA for cleanups that are performed in compliance with a state response program. EPA also observed that state and local governments will not be liable for costs and damages as a result of actions taken in response to an emergency under CERCLA § 107(d)(2), and that local governments will be eligible for reimbursement of costs for temporary emergency measures (up to $25,000) under CERCLA § 123.

For more information or questions regarding the EPA's Guidance, contact the authors.

EPA transition back to the office alarms employees
https://thehill.com/policy/energy-environment/510336-epa-transition-back-to-the-office-alarms-employees

BY REBECCA BEITSCH - 08/03/20 05:26 PM EDT

The Environmental Protection Agency (EPA) is moving ahead with the second phase of returning employees to the office, prompting concerns from employees as the agency's internal dashboard shows an uptick in cases.

The new guidelines don't force employees back to the office, but they kick off new restrictions on telework.

"Telework is at the option of the employee but you should notify your supervisor if you choose to telework. Facilities are open and employees have the option to return to the workplace," EPA Administrator Andrew Wheeler wrote to employees in an email obtained by The Hill.

Employees are also expected to return to normal work schedules unless they have "dependent care issues."

Unions representing EPA employees expressed alarm to the sudden change in status.

"What the email failed to mention is that this week's update to the Facility Status Dashboard indicates that HQ does not meet all the criteria set forth in the guidelines," the National Treasury Employees Union, which represents some EPA employees, said in a release.

The changes are in effect for EPA employees in the Washington, D.C., area as well as Boston and other locations.

But internal EPA data for D.C. shows the 14-day trend of new cases is up, and the 14-day incidence rate of new cases is 141.6 per 100,000 people, not under 10 per 100,000 as the agency set forth in its initial guidelines.

"The dashboard is the not the sole driver in reopening decisions but rather helps form decisions," EPA spokesman James Hewitt said by email.

"Moving into Phase 2 doesn't put any staff at additional risk as it gives employees the option to telework. The Phase 2 reopening for the Capital Region is also determined by guidance from local and state officials," he added.

Nate James, who represents EPA employees in D.C. with the American Federation of Government Employees Council, equated the return to the workplace as a game of Russian roulette.

"Sadly, it appears that our senior leadership is ... more concerned with maintaining appearances than employing safeguards that protect employee lives," he said in a release.

Democratic Bill Would Strengthen EPA's Pesticide Protections

https://news.bloomberglaw.com/environment-and-energy/democratic-bill-would-strengthen-epas-pesticide-protections

Aug. 4, 2020, 6:00 AM
Reporters: Dean Scott & Kellie Lunney

- Bill seeks to force EPA to act quickly on citizen lawsuits
- Time running out in 116th Congress to move legislation

House and Senate Democrats on Tuesday will unveil legislation that would allow the public to petition the EPA to immediately declare a pesticide as "dangerous" and force the agency to conduct more timely reviews of pesticides.

The bill, to be introduced in the Senate by Sen. Tom Udall (D-N.M.) and in the House by Rep. Joe Neguse (D-Colo.), is meant to address complaints that the agency has failed to aggressively regulate pesticides under Democratic and Republican administrations alike.

The outlook for the bill is unclear, given what little time the House and Senate are slated to be in session—less than six weeks total—between now and the November election.

No Republicans are sponsoring the bill, and Udall won't be in the Senate after the end of the year as he decided against running for a third term. That would leave it up to others to carry the torch on his pesticide legislation in the 117th Congress starting in January.

Congress directed the agency to regulate the sale and use of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The law also requires pesticides to be registered with the agency and directs manufacturers to provide labels on products detailing ingredients and instructions for safe use, storage, and disposal.

The Udall-Neguse Protect America's Children from Toxic Pesticides Act of 2020 would require the Environmental Protection Agency to consider citizen petitions that provide substantial evidence that a pesticide is dangerous.

If the EPA agreed the pesticide was dangerous, it would have to suspend the pesticide after receiving such a petition and if it also hadn't reviewed the pesticide for the last 15 years, according to a section-by-section detailing of the bill.

Key Player

Udall was a key player in the overhaul of the nation's chemical regulation law, the Toxic Substances Control Act, which President Barack Obama signed into law (P. Law No. 114-182) in 2016.

"In the past we've worked across the aisle to get issues like TSCA reform done and I am confident that environmental champions, industry, and lawmakers can come together in a bipartisan matter to find consensus on protecting Americans from toxic and dangerous chemicals," Udall said in an email to Bloomberg Law.

The legislation also would:

- Bar EPA from allowing the continued sale or use of stockpiles of pesticides when their EPA registrations have been canceled or suspended;
- Immediately cancel registrations for organophosphates—including pesticides such as chlorpyrifos, malathion, and diazinon—as well as paraquat, within six months of the bill being signed into law;
- Similarly cancel registrations of neonicotinoids—a class of insecticides chemically related to nicotine—used in the pesticides imidacloprid, clothianidin, thiamethoxam, dinotefuran, acetamiprid, sulfoxaflor, and flupyradifurone; and
- Require pesticide labels be printed in both English and Spanish and direct the EPA to develop an online system for tracking pesticide-related injuries and deaths to farm workers.

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ACE Opponents Ask Court To Reject EPA's 'Required' Air Law Reading
https://insideepa.com/daily-news/ace-opponents-ask-court-reject-epa-s-required-air-law-reading

August 3, 2020

Opponents of EPA's Affordable Clean Energy (ACE) greenhouse gas rule for coal-fired power plants are rebuffing the agency's arguments for why the rule is lawful and the product of a required interpretation of the Clean Air Act, doubling down on their allegations of numerous legal flaws.

The agency "fails to show that" air law section 111 "unambiguously required the agency to repeal the Clean Power Plan (CPP)," the much broader Obama-era rule that ACE replaced, according to a July 30 reply brief from a New York-led state coalition in American Lung Association, et al. v. EPA, pending in the U.S. Court of Appeals for the District of Columbia Circuit.

"Contrary to an assumption that runs throughout EPA's arguments, the fact that States use EPA guidelines to set standards for individual sources is not a reason that EPA's intercedent designation of the 'best system of emission reduction' [BSER] is limited to measures that apply at the level of an individualized source. Rather, the text and structure . . . assign distinct roles to EPA and the States and thereby authorize EPA to undertake a distinct inquiry in determining the best system," the brief adds.

By conflating the federal and state roles, "EPA shirks a responsibility Congress required it to fill," the states argue.

They also say that EPA's "artificially narrow interpretation" of its statutory authority "[u]ndermines the objectives that Congress sought to pursue," including giving the agency the flexibility to consider new methods of emission cuts. EPA's position, by contrast, precludes it from considering approaches such as generation shifting, which "the electricity industry actually uses to reduce emissions in a cost-effective manner."

The states allege that ACE has three other main legal flaws, including that EPA failed to weigh the statutory factor of pollution reduction in choosing heat rate improvements as the only BSER component and failed to explain its reversal in position from the CPP; that it failed to rebut state points about how ACE's lack of a minimum degree of emissions limitation undermines the air law's allocation of responsibilities to EPA and

states; and that EPA incorrectly argues that section 116 of the act -- which allows states to adopt different emission standards that are at least as stringent as the federal limits -- is not relevant to its decision to bar the use of emissions trading or averaging.

Further, the states argue ACE is unlawful because it does not include standards for gas-fired power plants. "The agency is wrong that its decision was nonfinal and that it can lawfully withdraw [carbon dioxide] emission guidelines for existing plants given that EPA is regulating CO2 from new gas-fired plants."

In addition to New York, states signing onto the brief include: California, Connecticut, Delaware, Colorado, Illinois, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Nevada, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Virginia, and Wisconsin as well as the District of Columbia and several large cities.

'No Such Limitation'

Environmental groups challenging the rule say in their July 30 reply that EPA's June 16 response brief "confirms" that the CPP repeal and ACE rule "are unlawful" because its central argument is that the Clean Air Act "does not permit the agency to designate the [BSER] that includes the most widely used and cost-effective means of reducing CO2."

But Congress "placed no such limitation in the Act," they stress. "The newest version of the agency's argument is inconsistent, unclear and unpersuasive. The complex, shifting quality of EPA's grammatical and textual arguments belies the agency's claim that it has recently discovered the statute's unambiguous meaning."

Additionally, environmentalists say EPA undermines its arguments that the CPP is "radical" by projecting that its emissions targets will be met due to market trends alone.

"Further, EPA errs in claiming the [CPP] regulated entities outside the power plant source category" because it "placed no obligations on non-emitting power sources; it allowed them to create emissions credits . . . reflecting reductions in pollution from the regulated CO2-emitting sources." States could also place a mass-based limit on individual sources under the Obama rule, they note.

These groups -- including American Lung Association, Environmental Defense Fund, Sierra Club, Natural Resources Defense Council and others -- add that EPA's defense "of the toothless ACE rule is meritless" because it "fails to show how a mere list of potential heat-rate measures -- which states can take or leave -- meets EPA's obligation to set a mandatory emission limit."

EPA's brief "confirms that the agency disregarded the central statutory obligation of emission reduction, and offers no satisfactory answer to record evidence that ACE will actually increase emissions in many states. It fails to justify ACE's arbitrary rejection of other, far more effective emission-reduction measures, including those consistent with EPA's cramped understanding of its statutory authority."

Industry Challengers

The agency is also facing challenges to the rule from some industry groups, which also filed reply briefs, including a July 30 filing from the Biogenic CO2 Coalition, a July 28 brief from the Texas Public Policy Foundation and the Competitive Enterprise Institute and a July 30 reply from a group of coal companies. The biomass group is challenge ACE for excluding biomass as a compliance measure, due to the agency's air law interpretation that GHG cuts have to be made within the facility's fence line.

"EPA does not explain why Congress would foreclose consideration of climate science and 'atypical' biogenic CO2 where the use of biofuels results in net reductions of greenhouse gas," its brief says. "No statutory text

demands that all aspects of compliance measures such as biomass co-firing physically occur on-site," nor does it foreclose accounting for off-site carbon capture net benefits.

The conservative think tanks argue that EPA is entirely prohibited from regulating power plants under section 111 and that it must first set a national ambient air quality standard under section 110 that would be supplemented with a 111 rule. Their reply also responds to EPA's challenge that they lack standing, arguing that ACE harms them in part because it will increase electricity costs.

The coal companies are challenging the rule over EPA's failure to make a power sector-specific endangerment finding, and because they argue EPA is prohibited from issuing the rule under section 111 because it already regulates power plants' air toxics under section 112.

"EPA's reinterpretation of the Act cannot be reconciled with the text or history of the Act, no matter how hard the Agency tries to rely on a cross-reference even it has called a drafting error. Nor can EPA escape the inexorable command of the text by reliance on erroneous citations to past precedent or alternative policy decisions that Congress could have, but did not, follow," the companies argue.

The section 112 argument featured prominently in prior court challenges to the CPP brought by a West Virginia-led state coalition and others, though most of these groups dropped this claim in the instant case in order to defend ACE.

The D.C. Circuit has not yet scheduled oral arguments in the case. -- Dawn Reeves (dreeves@iwpnews.com)

EPA Awards $4 Million to Develop New Approaches for Evaluating Chemical Toxicokinetics
https://www.natlawreview.com/article/epa-awards-4-million-to-develop-new-approaches-evaluating-chemical-toxicokinetics

Tuesday, August 4, 2020
Article by: Lynn L. Bergeson & Carla N. Hutton

On August 3, 2020, the U.S. Environmental Protection Agency (EPA) announced $3,980,782 in funding to five academic research teams to develop New Approach Methods (NAM) for evaluating chemical toxicokinetics. According to EPA, compared to traditional animal testing, NAMs allow researchers better to predict potential hazards for risk assessment purposes without the use of traditional methods that rely on animal testing. EPA is providing a grant of up to $800,000 to each research team through its Science to Achieve Results (STAR) Program. EPA states that the projects will address gaps in ways to obtain data for informing chemical toxicokinetics and exposure-related factors not currently considered. The five recipients include:

- Purdue University to create an integrated blood brain barrier computer model to help determine if a chemical may cause neurotoxicity;
- Texas A&M University to help integrate different types of chemical safety testing for more robust results;
- University of Nevada to develop better estimations of the bioavailability of chemicals to assess the significance of public exposure;
- Vanderbilt University to work on methods to refine organ-on-chip devices for chemical testing; and
- Woods Hole Oceanographic Institution to determine how zebrafish metabolism can be better correlated to the human metabolism to improve models for chemical toxicity testing.

EPA Defends Rule Permitting More Year-Round Ethanol Use
https://www.law360.com/articles/1297724/epa-defends-rule-permitting-more-year-round-ethanol-use

By Michael Phillis

Law360 (August 3, 2020, 4:03 PM EDT) -- The U.S. Environmental Protection Agency told the D.C. Circuit on Friday that its move to allow year-round sales of gasoline made with 15% ethanol is sound, pushing back against divergent arguments from various industry groups that its move either went too far or should have done more.

The agency said that all it did was allow a blended gasoline known as E15 to be sold throughout the year, closing a gap that prevented its wide distribution in the summertime. Interest groups tangling over the EPA's move last year to extend a Clean Air Act waiver to the blend that allows its wider sale either have a too-narrow view of the agency's power or believe the agency should have taken a much more ambitious approach it had no obligation to take, the EPA said.

"Permitting further E15 use, as the E15 rule does, is fully supportable and eminently reasonable from an historic, practical and technical perspective," the agency said. "So, petitioners rely almost exclusively on trying to constrict the statutory language to prohibit EPA from taking such a reasonable action."

The American Fuel & Petrochemical Manufacturers and other industry groups argued in May the CAA limits the waiver to gasoline with 10% ethanol, or E10, which previously could be sold in the summer. The Urban Air Initiative and other agricultural interests said in their brief that the EPA erred when it banned gasoline with additional ethanol.

The filings are part of a challenge to the EPA's move in 2019 to apply a CAA waiver to E15 — a move that fulfills a mandate from President Donald Trump that was supported by U.S. senators from corn-producing states. Ethanol in the U.S. is largely derived from corn.

The EPA reinterpreted a section of the CAA, which deals with the so-called 1-pound-per-square-inch Reid vapor pressure, or RVP, waiver. In higher-RVP fuels, emissions from cars can worsen ozone problems, the agency has said. The agency said the waiver now includes E15 gasoline, which the petroleum industry groups said is not a valid reading of the text.

The agency, accusing the AFPM of "seeking to protect its market share from the use of an additional 5% of ethanol in gasoline fuel blends during the summer," said the CAA aims to assist ethanol use, a goal the agency followed. It says the term "containing 10% ethanol" is ambiguous and that EPA properly reinterpreted it. Allowing the 1-psi RVP allowance to be applicable to "a fuel blend containing at least 10% ethanol" is "at the very least a reasonable interpretation."

An AFPM spokesperson disagreed, saying the EPA has long said the waiver applies to gasoline "at least 9% and no more than 10%" ethanol and is now claiming the opposite. The group said it "edits, rather than enforces, the will of Congress."

For fuels to be compatible with all vehicles, including older ones, the CAA says new fuels have to be "substantially similar" to old products that are used as benchmarks, called "certification fuels," according to the petroleum groups. But the industry groups said E15 has not been declared "substantially similar" to gasoline with no ethanol, "the fuel used to certify the overwhelming majority of the vehicle fleet."

The agency says that the AFPM wants the word "any" in the law to mean "all" when it does not. The statute says the EPA must determine new fuels are "substantially similar to any fuel" from any model year starting in

1975. This doesn't mean that a new fuel mixture has to be "substantially similar to all certification fuels" as the AFPM argues, but allows for "the progress of technology," the agency said. Plus, the agency said it has discretion to interpret this provision as it sees fit.

"There is no evidence that Congress intended EPA to ignore progress in the development of motor vehicles and their emissions control capabilities and continue into infinity to link all substantially similar determinations back to cars manufactured during the Gerald Ford administration," the EPA said.

The Urban Air Initiative's arguments, in contrast, that more ethanol in fuels should be allowed "misses the mark by a wide margin," the agency said. The agricultural industry groups agreed with the agency's move to allow yearlong sales of E15 gasoline but said the agency improperly prevented the sale of a variety of other fuel mixtures with higher concentrations of ethanol of up to 50%, referred to as midlevel blends. The groups argue midlevel blends are substantially similar to test fuels that are allowed.

But the agency said the UAI's argument includes an incorrect assumption. The rule being challenged addresses whether E15 "should be deemed substantially similar to E10, a certification fuel" for certain vehicles. The EPA's action did not touch on higher concentrations of ethanol, nor did it "prohibit its use" as the UAI suggested.

"UAI's claim challenges no final agency action and is therefore barred," the agency's brief said.

The EPA declined to comment beyond the filing.

A representative for the UAI declined to comment.

The EPA is represented by its own Stacey Garfinkle and Susmita Dubey and by Jonathan D. Brightbill and Perry M. Rosen of the U.S. Department of Justice's Environment & Natural Resources Division.

The Urban Air Initiative and other agricultural groups are represented by C. Boyden Gray, Jonathan Berry and James R. Conde of Boyden Gray & Associates.

The petroleum groups are collectively represented by Thomas A. Lorenzen, Robert J. Meyers and Elizabeth B. Dawson of Crowell & Moring LLP, Robert A. Long Jr., Kevin F. King, Thomas R. Brugato and Carlton Forbes of Covington & Burling LLP, John Wagner and Maryam Hatcher of the American Petroleum Institute and Richard S. Moskowitz and Tyler J. Kubik of the American Fuel & Petrochemical Manufacturers.

The lead case is American Fuel & Petrochemical Manufacturers et al. v. U.S. Environmental Protection Agency, case number 19-1124, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Keith Goldberg and Dave Simpson. Editing by Orlando Lorenzo.

Update: This story has been updated with a comment from AFPM.

Western Air Regulators Fear Dual Threats Of Wildfires, COVID-19 Pandemic
https://insideepa.com/daily-news/western-air-regulators-fear-dual-threats-wildfires-covid-19-pandemic

August 4, 2020

Western state air regulators are fearing potential adverse impacts through the combination of another destructive wildlife season that causes major spikes in particulate matter (PM) emissions and the ongoing threat of COVID-19 that some researchers suggest could exacerbate the already significant human health harms from PM exposure.

"This is an issue of great concern in the West," says one Western state source of the dual threats from the virus and from the potential for a bad wildfire season. The peak wildfire season in the Pacific Northwest and Northern California begins in August, sources say, and typically runs through at least October, and possibly beyond.

Fine particulate matter (PM2.5) exposure, long blamed for respiratory, cardiovascular and other health impacts, has been linked by recent studies with worsened health outcomes from COVID-19. Levels of PM2.5, the larger "coarse" PM10 and other pollutants can reach dangerous levels during wildfires, and the coincidence of this with a deadly respiratory infection could further enhance the risks.

Beyond the potential for the virus to worsen health effects from elevated levels of PM2.5, the pandemic is also causing problems for air regulators in other ways.

For example, advice EPA posted to its website on addressing indoor air threats from COVID-19 emphasizes keeping maximum ventilation to the outside in buildings to reduce the risks of virus transmission.

But this is the opposite of what is required in a wildfire, when residents are urged to close doors and windows to keep smoke out. EPA does recommend that better heating, ventilation and air conditioning (HVAC) systems, with improved filtration capabilities, be employed to combat both COVID-19 and fire smoke.

The pandemic complicates the deployment of firefighting personnel, who risk exposure both to the disease and heavy smoke, sources say. In some areas, states have set up clean air centers for at-risk citizens -- but congregating in such centers may now be at odds with best practices to fight COVID-19 through social distancing, sources say.

The western state source says, "There are a lot of folks putting a lot of thought into this; yes, HVAC is a good measure for both COVID and wildfire, but after that, things diverge quite rapidly."

Clean air centers are ordinarily a good idea to protect those most at risk from wildfire smoke, but "of course, for COVID-19, it isn't a great idea to gather many people together indoors. And firefighters gathering in camps for work for weeks at a time is not a great idea in the midst of a pandemic, so there are issues with fighting fires, too."

A second western state air regulator says, "We were concerned enough with smoke and the associated PM exposure to ask for [a] voluntary burn ban and have not been approving any open burning." Also, state departments of agriculture and forestry have stopped controlled "field" burns since the pandemic began.

"Wildfire smoke will be a challenge and taking shelter indoor helps only if the building is equipped with a decent filtration system." Further, "operation of shelters will be a challenge during pandemic."

Research On COVID-19-PM Link

Meanwhile, controversy continues to surround the research on the link between COVID-19 exposure and PM exposure. A recent Harvard School of Public Health study by air quality researchers Francesca Dominici and Xiao Wu has already generated a partisan split, with Democrats often citing the study's finding that PM

exposure increases mortality from COVID-19 in their criticism of Trump administration policies, and Republicans and industry skeptics questioning the findings.

Interest in the topic remains intense, with studies from Europe and Asia continuing to contribute to the body of evidence supporting a link.

However, none of the studies have conclusively shown that PM exposure actually causes worsened COVID outcomes, critics say, including industry consultant Tony Cox, chairman of EPA's Clean Air Scientific Advisory Committee (CASAC) that advises EPA on setting federal air quality standards.

An EPA spokesperson says, "Currently, EPA [Office of Research and Development] is not conducting any research addressing whether poor air quality contributes to worse outcomes for patients with COVID-19. The Agency is unaware of any high-quality peer reviewed data and studies available on SARS-CoV-2 infection and potential impacts of air quality."

However, EPA is working with the National Aeronautics and Space Administration and the National Oceanic and Atmospheric Administration "to better understand how COVID-related shutdowns have affected air quality in the United States."

The high level of interest in these issues is illustrated by a flood of research proposals received by the Health Effects Institute (HEI), a joint EPA and industry-funded research body that examines the relationship between air pollution and health. HEI in May issued a request for applications for HEI funding to study air pollution, COVID-19, and health.

The request "solicits applications for research on novel and important aspects of the intersection of exposure to air pollution and COVID-19 health outcomes."

HEI is particularly interested in applications that address "accountability research, a field that seeks to measure the impacts of policy measures on health outcomes. "What are the effects of the unprecedented interventions taken to control the COVID-19 pandemic on emissions, air pollution, and human health?" HEI asks.

Also, HEI is interested in "susceptibility factors," asking for studies that seek to answer "Are individuals/populations who have been chronically or acutely exposed to higher levels of air pollution at greater risk of mortality from COVID-19 compared to those exposed to lower levels of air pollution? Do the effects differ by race/ethnicity or by measures of socioeconomic status?"

An HEI source says, "We received 45 Letters of Intent in three weeks (lots of interest) and our Research Committee narrowed that to 11 teams from which we are expecting full proposals for review this fall." -- Stuart Parker (sparker@ipwnews.com)

EPA Defends Rule Authorizing Year-Round Use Of E15 In Most Vehicles
https://insideepa.com/daily-news/epa-defends-rule-authorizing-year-round-use-e15-most-vehicles

August 4, 2020

EPA in a new legal brief is defending its rule allowing year-round use of 15 percent ethanol (E15) blends in most vehicles by saying refiners wrongly claim the move is unlawful and that some fuel retailers lack standing to sue over the decision, while also rejecting biofuels makers' call to allow higher blends.

"E15 already is in use for much of the year and in general exists at a lower volatility level (lower [Reid Vapor Pressure (RVP)]) than the predominant E10. Thus, permitting further E15 use, as the E15 Rule does, is fully supportable and eminently reasonable from an historic, practical, and technical perspective," the agency says in a July 31 brief in American Fuel Petrochemical Manufacturers (AFPM), et al. v. EPA, et al.

The case, pending in the U.S. Court of Appeals for the District of Columbia Circuit, consolidates lawsuits filed over EPA's June 2019 rule that changed a prior Clean Air Act interpretation and related rules to allow an annual E15 waiver from the RVP limits during the June 1-Sept. 15 summer ozone season.
Summertime fuel must typically have an RVP of not more than 9 pounds per square inch (psi), though an earlier waiver allowed use of the national standard E10. However, blends above E10 were prohibited from year-round use, and the E15 waiver now allows that fuel to be used throughout the year.

EPA justified the sale of E15 year-round on the grounds that it is "substantially similar" to existing E10 test fuel, but the pro-ethanol Urban Air Initiative (UAI) and allied biofuels groups are challenging the rule in the D.C. Circuit by arguing that the agency should have allowed even higher blends.

In contrast, AFPM -- representing large refiners -- and the Small Retailers Coalition (SRC) representing smaller independent petroleum retailers and convenience stores say the agency's decision was not legal and that it should not have approved E15. In recent legal filings in the case, the refining groups argued the agency unlawfully reinterpreted statutory language to allow E15 sales in the summer.

EPA's 'Discretion'

EPA's new filing counters all of the claims the competing sides raised in their briefs, reiterating that approving E15 was a lawful decision that it had the discretion to make.

"Petitioners rely almost exclusively on trying to constrict the statutory language to prohibit EPA from taking such a reasonable action. But Congress imposed no such restrictions in the applicable statutory provisions. Instead it left it for EPA to exercise its discretion and technical expertise regarding the introduction and use of fuel blends in a reasonable manner. The E15 Rule does just that," the agency says.

AFPM argued EPA unlawfully extended E10's existing RVP waiver to E15: "EPA's re-interpretation of the phrase 'containing gasoline and 10 percent . . . ethanol' as encompassing blends containing more than 10% ethanol fails" at the first step of the Chevron legal test, the groups say. "Under Chevron, courts defer to federal agencies' reasonable interpretations of statutes where the statute is silent or ambiguous on a topic. . . . The statutory text and ordinary tools of statutory construction resolve the issue: 'containing gasoline and 10 percent . . . ethanol' establishes a specific requirement that a blend contain 10% ethanol, not a minimum of 10%."

The agency in its filing responds: "EPA does not contend that AFPM's interpretation is wholly unreasonable. Indeed, EPA interpreted the operative phrase similarly for a period of time."

But it adds that after further examining and reflecting on the relevant statutory text and "surrounding circumstances," it revised its interpretation of the language to find that it allows blends at "at least" 10 percent ethanol. The agency says this "at the very least a reasonable interpretation of the statute."

EPA also faults SRC's claim that the rule violates the Regulatory Flexibility Act and is arbitrary and capricious because it did not fully analyze the potential effects of the decision on small fuel retailers. The agency counters that SRC's focus is on mandates under a separate fuels program. "It is quite clear, however, that SRC's concerns relate to the operation of the Renewable Fuels Standard program and the regulatory requirements under that program, not to any requirements imposed or even considered under the E15 Rule," the agency says.

Nothing in the rule mandates the use of the higher ethanol blends, and therefore SRC lacks legal standing to sue over the decision, the brief adds. "Since the Rule obligates no party to blend or sell E15 or take any other actions with regard to it, it places no burden on small retailers. Thus, not only are SRC's claims about impacts of the E15 Rule without merit, SRC lacks standing to assert those claims."

Ethanol Blends

Finally, EPA rejects UAI's claim that the rule should have allowed even-higher ethanol blends, saying that it focused solely on whether to approve year-round use of E15.

"No doubt EPA could at some time, after careful analysis, determine whether a blend with a concentration of ethanol between 16% and 50% is (or is not) substantially similar to E10 or another certification fuel. But such a determination must actually be considered and then finalized by EPA. None of that occurred here. Hence, UAI's claim challenges no final agency action and is therefore barred. Nor does its claim concern an injury caused by the E15 Rule, and thus UAI lacks standing," the agency says. -- Anthony Lacey (alacey@iwpnews.com)

In OMB Call, CARB Stresses Opposition To EPA Ending 'Once-In' Air Policy
https://insideepa.com/daily-news/omb-call-carb-stresses-opposition-epa-ending-once-air-policy

August 4, 2020

In an Aug. 3 phone call with White House Office of Management & Budget (OMB) staff, California air board officials reiterated their strong opposition to EPA's proposal to end the "once in, always in" policy that forces industrial facilities to retain "major source" air toxics controls even if they reduce emissions below major source thresholds.

"We largely summarized the comments we submitted on the proposed rule . . . and provided a more holistic view of California's toxics regulatory programs and how the rule would be a step backward for us," says a California Air Resources Board (CARB) spokeswoman.

Officially known as the "Reclassification of Major Sources as Area Sources Under section 112 of the Clean Air Act," EPA proposed the rulemaking on July 26, 2019, to amend the general provisions of the National Emission Standards for Hazardous Air Pollutants (NESHAP), according to the regulatory docket. The rulemaking would effectively scrap the long-running policy that the Trump administration had previously said in guidance no longer applies.

The public comment period for the rulemaking to codify that guidance ended on Nov. 1. Industry and environmental groups have clashed over the probable impacts of EPA's proposal, signaling a key issue in expected litigation should EPA finalize the plan.

Under the "once-in" policy established in 1995, major sources subject to stringent maximum achievable control technology (MACT) controls for hazardous air pollutants (HAPs) may not remove those controls, and may not re-classify themselves as "area" sources subject to weaker controls even if they reduce emissions below the major source thresholds.

Industry has long argued this is unfair and an incorrect reading of the Clean Air Act, and the Trump EPA moved to scrap the policy first through its guidance and now with its pending rulemaking. The agency sent the final rule for mandatory OMB pre-publication review on July 16, and the most recent Unified Agenda of pending federal regulations included a target of issuing the policy in July -- a non-binding deadline that EPA has now missed.

Environmentalists and some states say ending the policy would allow polluters to shed MACT and in fact increase their emissions, and CARB has aired its concerns both at the recent meeting and in prior written comments.

In Sept. 24 written comments, CARB staff complained that EPA is also proposing to amend its definition for "potential to emit" (PTE) "to remove the requirement of federal enforceability for any PTE limitations and instead require what it calls legal and practical enforceability -- a rollback which would practically decrease oversight and enforceability on the most toxic air pollution sources."

CARB further claimed that the proposal is inconsistent with and contrary to section 112 of the Clean Air Act because it will allow major sources to increase their "actual HAP emissions," and "by default change the universal maximum level of control from the MACT level to a patchwork of weakened control levels across the nation."

EPA's emission impact analysis of the proposal is "so limited as to be arbitrary and capricious, and provides no evidentiary basis to support" the agency's views, CARB also charged.

And allowing major sources to reclassify as area sources at any time has "significant adverse effects on the states, because states must dedicate rulemaking resources to make up for federal rollbacks, as well as dedicating enforcement resources to address the failures of federal enforcement -- all while potentially losing some federal funding to do so," CARB maintained.

An EPA spokeswoman declined to say when the agency expects the rule to be finalized, adding that it is "in interagency review."

OMB did not immediately respond to a question about when it plans to complete its review of the proposed rulemaking. -- Curt Barry (cbarry@iwpnews.com)

U.S. Energy Department recommends granting partial retroactive waivers to refiners: sources
https://uk.reuters.com/article/us-usa-biofuels-epa/us-energy-department-recommends-granting-partial-retroactive-waivers-to-refiners-sources-idUKKCN2501UI

Stephanie Kelly

3 MIN READ

NEW YORK (Reuters) - The U.S. Department of Energy has recommended that some of the oil refiners that applied for retroactive exemptions from the nation's biofuel blending law be granted partial relief, two sources familiar with the matter said on Tuesday.

The move could help bring those refining companies into compliance with a court ruling earlier this year that requires waivers granted since 2010 to take the form of an extension - the latest twist in a long-running battle between the refining and biofuel industries over the program.

At present there are 58 pending requests from refiners for waivers covering the years 2011 through 2018, according to government data. The sources said the DOE recommended to the U.S. Environmental Protection Agency, which has final say on the waivers, that "a number" of those requests be partially granted. The sources, who requested anonymity in order to speak candidly, could not immediately provide further details.

EPA and DOE did not immediately comment.

Under the U.S. Renewable Fuel Standard (RFS), oil refiners must blend billions of gallons of biofuels into their fuel, or buy credits from those that do. Small refiners that prove the rules would financially harm them can apply for exemptions.

In January, the Denver-based 10th U.S. Circuit Court of Appeals ruled that waivers granted to small refineries after 2010 had to take the form of an "extension." That cast doubt over the waiver program because most recipients of waivers in recent years have not continuously received them each year since 2010.

Biofuel advocates say blending waivers hurt demand for corn-based ethanol. The oil industry disputes that, and says blending requirements are too expensive.

The EPA has 90 days to act on a petition after the date of receipt of the petition, according to EPA guidelines.

Biofuel advocates urged EPA to reject the retroactive requests.

"These 'gap year' waivers need to be thrown in the garbage and the 10th circuit decision applied nationwide," said U.S. Senator Joni Ernst of Iowa, the top ethanol-producing state.

Reporting by Stephanie Kelly in New York; Editing by Matthew Lewis and David Gregorio

Safe Drinking Water Act Enforcement: U.S. Environmental Protection Agency and Township of Belleville, New Jersey, Enter into Consent Agreement
https://www.jdsupra.com/legalnews/safe-drinking-water-act-enforcement-u-s-97227/

August 4, 2020
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

The United States Environmental Protection Agency ("EPA") and Township of Belleville, New Jersey, ("Belleville") entered into a July 22nd Consent Agreement and Final Order ("CAFO") addressing an alleged violation of the Safe Drinking Water Act ("SDWA"). See Docket No. SDWA-02-2020-8401.

The CAFO addresses a public water system ("System") owned/operated by Belleville.

The Belleville System is stated to be a "supplier of water" as that term is defined by the SDWA. The System is stated to regularly serve at last 15 service connections used by year-round residents and/or regularly serves at

least 25 year-round residents. As a result, it is stated to be a "community water system" as defined by the relevant section of the SDWA.

A community water system is subject to the requirements of Part B of the SDWA and the statute's implementing regulations.

Belleville was stated to have been required by an Administrative Order to comply with the SDWA's Consumer Confidence Report ("CCR") requirements. The Township is stated to have transmitted a copy of the 2018 CCR. However, the CCR did not contain all required information.

Belleville is stated to have submitted on August 6, 2019, a copy of the CCR that had been provided to customers by July 1, 2019. The CCR is stated to have met the language and content requirements of the relevant SDWA regulations. Therefore, EPA is stated to have deemed that the compliance requirements of the previously referenced Administrative Order had been satisfied.

The CAFO provides that Belleville neither admits nor denies the factual allegations.

A civil penalty of $3,000 is assessed.

A copy of the CAFO can be downloaded here.

D.C. Circuit schedules October argument in suit over EPA ACE rule
https://insideepa.com/daily-feed/dc-circuit-schedules-october-argument-suit-over-epa-ace-rule

August 4, 2020

The U.S. Court of Appeals for the District of Columbia Circuit has scheduled oral argument for Oct. 8 in consolidated challenges to EPA's Affordable Clean Energy (ACE) coal plant greenhouse gas rule, with the proceedings to occur less than a month before the presidential election that could play a major factor in the rule's fate.

The court in an Aug. 3 order setting the argument date in American Lung Association (ALA), et al. v. EPA, et al. also says it will announce the three-judge panel that will hear the case as well as the format of the arguments about 30 days in advance.

The order came just days after rule opponents filed final reply briefs, where state and environmental groups asked the court to reject EPA's argument that its narrow reading of the Clean Air Act is the only permissible interpretation.

The future of ACE could mirror the fate of the Obama-era Clean Power Plan (CPP), which the ACE rule replaces, depending on whether President Donald Trump wins re-election or presumptive Democratic candidate Joe Biden prevails, as Biden is advocating sweeping controls on GHGs.

However, one major difference is that the D.C. Circuit currently is not planning to consider litigation over the ACE rule by the full slate of active judges, as it did when it heard arguments in September 2016 over the CPP in West Virginia, et al. v. EPA, et al.

In West Virginia, the 10-judge en banc court heard two full days of arguments but it did not issue a ruling by the time Trump won the presidency that November. After he took office, EPA successfully asked the court to

pause the case until the agency last year finalized its repeal of the CPP and the ACE rule replacement. The court ultimately dismissed the challenge over the objections of CPP supporters.

Now, it appears almost impossible that the court would issue a merits ruling in ALA before the Nov. 3 election or even before inauguration day in January. That means that if Trump loses to former Vice President Biden, a new administration could similarly seek to stay the ACE litigation while it imposes a stricter power plant GHG rule.

If Trump wins a second term, then the rule's fate likely will be determined by the court, though any D.C. Circuit ruling is likely to be appealed to the Supreme Court by the losing side.

Ranchers urge district court to block several WOTUS rule provisions
https://insideepa.com/daily-feed/ranchers-urge-district-court-block-several-wotus-rule-provisions

August 4, 2020

Washington cattle ranchers are urging a federal district court to block several provisions of the Trump administration's narrow Clean Water Act (CWA) jurisdiction rule, saying EPA and the Army Corps of Engineers' defenses of the rule are misplaced and that the agencies are wrong to claim the ranchers' suit is premature.

In the U.S. District Court for the Western District of Washington case Washington Cattlemen's Association v. EPA, et al., the administration is defending the EPA-Corps rule defining "waters of the United States" (WOTUS) by arguing that it is within the agencies' discretion to interpret an ambiguous term such as WOTUS.

But the Washington Cattlemen's Association in a July 24 brief urges the court to halt implementation of some elements of the rule, while outlining legal attacks on the policy and claiming that their case is ripe for judicial review.

The group, representing ranchers in the state, says the late Justice Antonin Scalia's plurality opinion in the landmark 2007 high Supreme Court CWA jurisdiction case Rapanos v. U.S. bars any regulation of intermittent waters and wetlands that do not directly touch jurisdictional waterways.

The agencies have claimed in both the Washington case and similar suits that they had discretion to include some of those waters in their definition of WOTUS.

But the ranchers' brief says, "Justice Scalia emphasized that a navigable water must be 'relatively permanent' and contain 'at bare minimum, the ordinary presence of water.' That is incompatible with the Rule which covers any surface water which flows only 'during certain times of year' so long as it is 'more than in direct response to precipitation.' This definition falls short of the plurality's requirements in both frequency and intensity."

The agencies' rule generally narrows the scope of CWA jurisdiction in line with Scalia's Rapanos opinion but the ranching group -- one of three such organizations that have brought suits claiming the new standard is too broad, each represented by the free-market Pacific Legal Foundation -- says it oversteps those limits by sweeping in some intermittent tributaries and wetlands that do not directly touch other waters.

The Trump administration argued in its brief opposing an injunction that the rule is a reasonable reading of ambiguous statutory text, which means courts should defer to the agencies' approach under precedents known

as Chevron and Brand X. But the ranchers say the Rapanos precedent removes any ambiguity over those provisions.

"If the statute is unambiguous in excluding intermittent tributaries and non-abutting wetlands, as the Rapanos plurality holds, then Chevron and Brand X are not available to salvage the Agencies' decision to regulate them," the cattlemen's new brief says.

EPA unions oppose move to 'Phase 2' reopening during pandemic
https://insideepa.com/daily-feed/epa-unions-oppose-move-phase-2-reopening-during-pandemic

August 4, 2020

EPA's two largest employee unions are opposing agency Administrator Andrew Wheeler's decision to move its Washington, D.C. headquarters and Region 1 office in Boston to "phase 2" of its COVID-19 reopening strategy, warning it is at odds with the government's "gating criteria" that requires a drop in virus cases before advancing reopening.

The American Federation of Government Employees (AFGE) in an Aug. 3 statement says the plan is happening despite workers' repeated objections that any step to bring them back to their offices is premature and dangerous.

And the National Treasury Employee Union (NTEU) is adding to the criticism, saying the plan is still subject to ongoing negotiations with unions. It adds that Wheeler "failed to mention . . . this week's update to the Facility Status Dashboard indicates that HQ does NOT meet all the criteria set forth in the guidelines."

Both unions are objecting to Wheeler's July 31 email to agency employees that said the headquarters office and the Region 1 office in Boston will as of Aug. 4 advance to phase 2, which means full telework is no longer encouraged. EPA's three-phase plan has the strictest virus lockdown measures for phase 1, followed by a gradual reopening under phase 2, and finally full reopening with phase 3.

"Both the National Capitol Region and Region 1 have been in phase 1 for 39 days because I wanted to be certain that we did not move too quickly," Wheeler wrote, stating that both offices could move to phase 2 Tuesday, Aug. 4. "At this point, I am confident that we should move into phase 2."

But AFGE says "EPA is disregarding" gating criteria on an employee-accessible dashboard that the government recommends to use for reopening decisions.

The criteria to move to phase 2 requires a 14-day downward trend of new cases or a 14-day downward trend in the rate of positive tests or the number of new cases per 100,000 people below 10. A screenshot of the July 31 dashboard from NTEU shows that the D.C. office is "in the red" across all three categories. The D.C. area has tended upward in COVID-19 cases over the last 28 days and has more than 140 cases per 100,000 residents over the past two weeks.

However, an EPA spokesman says that the dashboard "is not the sole driver in reopening decisions, but rather helps form decisions." The spokesman adds that moving to phase 2 "doesn't put any staff at additional risk as it gives employees the option to telework. The phase 2 reopening for the Capital Region is also determined by guidance from local and state officials."

NTEU says it has requested a briefing with EPA management "regarding this unsupported change in the still-unnegotiated terms of reopening. In spite of [Wheeler's] repeated assurances that employees' health and safety is his first priority, this move indicates the contrary. Considering our successful implementation of 'maximum telework' for the past four months, it is difficult to identify any logical or mission-related purpose for putting more employees and their families at risk and for disrupting the current implementation that is working so well for so many people."

Also, AFGE's Washington D.C. chapter president Nate James said in a statement, "Throughout this devastating pandemic, employees have looked to their leadership for accurate and credible responses that ensure the health and safety of all employees. Sadly, it appears that our senior leadership is willing to spin the facts, more concerned with maintaining appearances than employing safeguards that protect employees' lives."

He adds that Wheeler's email "sent a shockwave through the workforce that has crushed any hopes that our leadership was sincere in their comments suggesting that employee welfare was a priority."

James calls the decision "reckless and a slap in the face of every employee that serves EPA," and notes that nearly one third of agency staff are veterans and many of those have faced combat. "It would be a disgrace if just one life was senselessly wasted simply because our agency leadership had not the courage to make the right decision."

Other offices slated to move to phase 2 include Traverse City, MI; Duluth, MN; Narragansett, RI; New Haven, CT; Helena, MT; Buffalo, Albany and Syracuse, NY; Wheeling, WV; and Middleburg Heights and Westlake, OH.